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From: tyu iuy <libraryappeal@yahoo.com>
To: <CCBSecretary@FCC.GOV>
Date: Mon, Mar 25, 2002 12:07 PM
Subject: Appeal (IMPORTANT SEE E-MAIL TEXT)

This e-mail contains the actual appeal only. The appeal is presented with 2 exhibits which are not included in this e-mail. The appeal has also been sent via overnight Airborne and that package includes those 2 exhibits.

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**Before the
Federal Communications Commission
Washington, DC 20554**

March 20, 2002

In the Matter of

Request for Review of the
Decision of the
Universal Service Administrator by

CC Docket No. 96-45

CC Docket No. 97-21

Eastern Parkway Chabad Resource Center
Library of Agudas Chassidei Chabad Lubavitch
770 Eastern Parkway
Brooklyn NY 11213

Form 471 Application # 230062
Funding Year 4
Entity # 217541
Contact Person: Moshe Berghoff
Position: Administrator
Telephone: 718.774.4000

This letter is an appeal of an SLD Funding Commitment Decision, dated January 25, 2002, that determined Eastern Parkway Chabad Resource Center, Library of Agudas Chassidei Chabad Lubavitch is not an entity eligible to receive funding under program rules. The applicant maintains that it is indeed eligible and that it meets the eligibility requirements set forth in 47 U.S.C 254(h)(4). The applicant files this appeal directly with the Commission because this appeal entails the interpretation of unclear provisions of statutes and rules, a matter that the SLD is not authorized to rule on pursuant to 47 CFR 54.702(c).

FACTS

Eastern Parkway Chabad Resource Center, Library of Agudas Chassidei Chabad Lubavitch is an independently funded library that is open to the public. The library has one the largest and most extensive collections in the world of philosophical, theological and legal works of a Judaic nature. This collection was amassed from the 18th century to the present. The library has approximately 250,000 volumes, many of them extremely rare and out of print and not available anywhere else in the world. The primary purpose of the library is to provide researchers with a comprehensive collection of material in their respective areas of expertise. A detailed description of the exact nature of this collection is provided in a brochure published by the library and is presented along with this filing as Exhibit A¹.

The library filed a Form 471, application #230062, requesting funding for certain items through the e-rate program for Funding Year 4. The SLD did not conduct any correspondence or make any contact with the library throughout the review process of that application. Subsequently the SLD issued a Funding Commitment Decision to deny

¹ See also the library's website at www.chabadlibrary.org

all FRN's in the library's application. The Funding Commitment Decision Explanation provided was that the library "is not eligible to receive funding based on the program rules for eligible entities". The SLD provided no further explanation.

Although the SLD explanation does not describe which program rules it was referring to, correspondence that the SLD conducted with other libraries affiliated with the applicant provides an understanding of the SLD's interpretation of the program rules under which the SLD concluded that the applicant is an ineligible entity. In a letter sent by the SLD to many other libraries applying for funding under the e-rate program the applicants were notified that the SLD must establish that the library was eligible for Library Services and Technology Act funding at the time that the application was filed. The SLD instructed those libraries to contact their state's State Library office to receive certification of LSTA eligibility. The apparent and reasonable interpretation of these instructions was that the State Library was to certify that the library met the criteria to receive LSTA funding under that state's LSTA grant program.

In a different letter by the State Library of California an applicant was advised that the State Library was requested by the SLD to verify that applicant's eligibility to receive LSTA funding. That letter explicitly stated that for a library to be eligible for Universal Service that library must meet both federal LSTA eligibility criteria and additional conditions imposed by the state of California, such as the library having qualified staff, which California library law defines as at least one member who has completed a masters level library education program accredited by the American Library Association³.

The state in which the applicant is located, New York, allows only libraries that are members of a regional library system to participate in its LSTA funded programs. The New York Metropolitan area regional library system, where the applicant is located, requires its members to participate in an interlibrary loan program. Since the applicant does not participate in such a program it is not eligible for membership in the Metropolitan New York Library Council, and therefore not eligible to participate in LSTA funded programs administered by the state of New York. Apparently the SLD concluded that since the applicant did not meet the criteria that New York established for

³ See California LSTA eligibility criteria in Exhibit B

participants in its LSTA funded programs the applicant was therefore not eligible to receive Universal Service under program rules.

QUESTIONS PRESENTED

47 U.S.C. 254 (h)(4) states as follows; Eligibility of users: No entity listed in this subsection shall be entitled to preferential rates or treatment as required by this subsection, if such entity operates as a for-profit business, is a school described in paragraph (5)(A) with an endowment of more than \$50,000,000, or is a library or library consortium not eligible for assistance from a State library administrative agency under the Library Services and Technology Act (20 U.S.C. 9121 et seq.).

I) Does the above subsection require a library to meet criteria established by a state, as a condition to receive grants from that state's LSTA funds, in addition to meeting the eligibility criteria for LSTA funding under section 20 U.S.C. 9122?

II) 20 U.S.C. 9163 provides that the determination of the best use of LSTA funds shall be reserved for the States and their local subdivisions. If a state determines that funding a particular type of library is not the best use of its limited funds does that deem that library not "eligible for assistance from a State library administrative agency"?

III) Did the SLD exceed the authority vested in it by Congress or the Commission in determining that Eastern Parkway Chabad Resource Center, Library of Agudas Chassidei Chabad Lubavitch is an entity that is not eligible to receive funding under program rules?

DISCUSSION

20 U.S.C. 9122 (2)(d)(i,ii), the LSTA Act cited in 47 U.S.C. 254(h)(4) as the definition of a library, states; The term "library" includes - (D) a research library, which for the purposes of this subchapter means a library that - (i) makes publicly available library services and materials suitable for scholarly research and not otherwise available to the public; and (ii) is not an integral part of an institution of higher education. The library's stated mission and purpose is to provide material not otherwise available for researchers, writers, professors and members of the clergy⁴. The library is also not affiliated with any institution of higher education. It is therefore clear that the applicant qualifies as a research library and therefore meets the statutory definition of a library under the LSTA Act and is eligible to receive funding under the LSTA Act.

1) The SLD decision, which determined that the applicant is an entity not eligible to receive funding under program rules assumes that the intent of (h)(4) is that a library must qualify for the actual allocation of an LSTA grant in its state, regardless of what criteria that state established for participants in its LSTA programs. However it is apparent and evident from the Commission's Universal Services Report and Order that the reference to the LSTA Act was for the purpose of defining libraries eligible for support. The intention of (h)(4) is that for purposes of universal services eligibility a library shall be defined according to the definitions of a library as set forth in section 20 regarding eligibility for LSTA. Therefore any library that meets the conditions set forth in the LSTA act is eligible for Universal Services funding.

In the Report and Order⁵ the Commission decides to "adopt the definition of library contained in the Library Services and Technology Act for purposes of section 254(h)". In section 10 of the Report⁶ the Commission addresses the issue of library eligibility with the following language "Section 254(h)(5) does not include an explicit

⁴ see Exhibit A p.7

⁵ at 32

⁶ at 556

definition of libraries eligible for support. Rather, in section 254(h)(4)'s eligibility criteria, Congress cited LSCA" (amended in 1996 to LSTA, see *infra*), "We, therefore, adopt the LSTA definition of library for purposes of section 254(h)⁷. (See also footnote 1436 which references the LSTA Act as a definition of "a library").

The above demonstrates clearly and persuasively that (h)(4) is to be construed as requiring eligible libraries to satisfy the definition of libraries set forth in the LSTA Act. By citing that Act it was not the intent of Congress to limit eligibility only to those libraries that qualify for an actual grant under an LSTA funded program administered in that library's state.

254(h)(4) initially cited LSCA which limited eligible libraries to public libraries and a limited group of research libraries. In 1996 when LSCA was repealed and replaced with the LSTA Act⁸, an act that greatly broadens the definition of a library, (h)(4) was amended to reference the LSTA Act. The explicit purpose of amending (h)(4) was to grant more libraries access to universal services, and to broaden the scope of eligible libraries..

If (h)(4) is to be construed as to require libraries to qualify for funding under state administered LSTA program guidelines, the effect of that amendment would actually limit the scope of eligible libraries and the resulting definition of libraries for purposes of Universal Service eligibility would actually be narrower than what it would be under the LSCA definition.

California along with several other states require a library to be staffed by a person with a masters degree in library or information science. Thousands of public libraries, eligible under LSCA, do not have librarians who have completed a masters level library education program accredited by the American Library Association⁹, or do not meet other conditions imposed by certain states, and would therefore not qualify to participate in an LSTA funded program in those states.

In addition LSCA supported funding for certain academic libraries that were not

⁷ at 558

⁸ Pub. L. 104-208, div. A, title I, Sec. 101(e) (title VII, Sec. 708 (a)), Sept. 30, 1996, 110 Stat. 3009-233, 3009-312

⁹ The National Center for Educational Statistics database shows that in 1999 there were 4961 public libraries that did not have ALA-MLS librarians

supported through public funds. Under LSTA there are ten state library agencies¹⁰ that do not administer an LSTA funded program that provides assistance to academic libraries. Of the agencies that do provide grants to academic libraries, many limit that funding to those that are publicly funded. Thus the result of amending (h)(4) to LSTA would serve primarily to disqualify previously eligible entities.

Construing (h)(4) as to require libraries to qualify for participation in an actual state administered LSTA program would defeat the legislative intent in amending (h)(4), which was to broaden the scope of eligible libraries. Such construction would also result in a policy that excessively discriminates against libraries depending on which state the library is located.

It is therefore apparent that in amending (h)(4), Congress intended that for purposes of qualifying for Universal Service libraries are required to meet only the statutory definition of libraries as set forth in the LSTA Act. Libraries are not required to qualify for participation in an actual LSTA funded program. Therefore Eastern Parkway Chabad Resource Center, Library of Agudas Chassidei Chabad Lubavitch which meets the statutory definition of libraries as set forth in the LSTA Act is eligible for Universal Service.

II) 20 U.S.C. 9141(a) sets forth a wide set of purposes for which states may apportion funding received under the LSTA Act. Specifically, paragraph (b) of that subsection allows states to apportion its share of funding "as appropriate, to meet the needs of the individual State".

20 U.S.C.9163 states; "Nothing in this subchapter shall be construed to interfere with State and local initiatives and responsibility in the conduct of library services. The administration of libraries, the selection of personnel and library books and materials, and insofar as consistent with the purposes of this subchapter, the determination of the best uses of the funds provided under this subchapter, shall be reserved for the States and their local subdivisions".

The only restriction placed on states in utilizing LSTA funds is that its

¹⁰ Source, NCES. Those states are; Alabama, Hawaii, Louisiana, Maine, Maryland, Minnesota, Tennessee, Texas Vermont and the District of Columbia

expenditures be “consistent with the purposes of this subchapter”. A state is not required to appropriate LSTA funds to every entity that is eligible to receive funding under the Act. As a result of this allocation mechanism a library may be “eligible for assistance from a State library administrative agency”, as defined in the eligibility criteria set forth in section 9122, and still not qualify for any of the programs that were established in that state because the state has the discretion to determine “the needs of that individual state”.

Section 9151 requires states that wish to establish an advisory council that the council be “representative of the library entities in the State, including public, school, academic, special, and institutional libraries, and libraries serving individuals with disabilities”. Clearly the legislative intent was that although an entity may not receive funding, that entity is nonetheless eligible to receive funding and therefore has the right to participate in decisions made regarding that funding.

Section 9122 (2)(E)¹¹ clearly limits state authority to determine “that a library should be considered a library for purposes of this subchapter” to private or special libraries not included in (2)(A, B, C or D) of that subsection. It is evident that state authority to determine whether a library is considered a library for purposes of LSTA is restricted to the category of libraries described in (2)(E). Other libraries, eligible under 9122, are designated as libraries for purposes of the Act regardless of state recognition of that library for purposes of LSTA.

In light of the above it is plain and obvious that a library that does not qualify for funding, allocated by a state under a state’s discretion to determine “the needs of that individual state”, is nevertheless eligible, as a matter of law, to receive LSTA funding. An interpretation of (h)(4) as to require a library to qualify for actual funding from an LSTA funded state administered program is clearly erroneous.

¹¹Section 9122 (2)(E) states; a private library or other special library, but only if the State in which such private or special library is located determines that the library should be considered a library for purposes of this subchapter.

III) The SLD decision entails findings and rulings in regard to both questions of law and matters of fact. The SLD ruling on both of these matters was not in compliance with the rules and procedures established by the Commission.

A) Matters of Law. The SLD ruling that the applicant is ineligible to receive funding under program rules is based on an interpretation of Section 254 (h)(4). The SLD is not authorized to interpret this statute. 47 CFR 54.702(c) limits the authority of the SLD as follows; The Administrator may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress. Where the Act or the Commission's rules are unclear, or do not address a particular situation, the Administrator shall seek guidance from the Commission.

The SLD decision, which determined an entity's eligibility under program rules, is based on the interpretation of unclear provisions of a statute, an interpretation it was not authorized to make. Accordingly the Funding Commitment Decision based on that interpretation must be vacated.

B) Matters of Fact. The SLD decision may be based on certain factual findings and assumptions pertaining to the nature of Eastern Parkway Chabad Resource Center, Library of Agudas Chassidei Chabad Lubavitch¹². The process in which the SLD arrived at these factual findings was not in compliance with FCC rulings.

The SLD decision may be explained, in the alternative, that the SLD, without requesting any additional information from the applicant, concluded as a matter of fact that Eastern Parkway Chabad Resource Center, Library of Agudas Chassidei Chabad Lubavitch did not qualify as a research library under 20 USC 9122(2)(d)(i,ii).

According to SLD written procedure the SLD must consider new information on appeal if "there is evidence on file that the applicant was not given the opportunity to provide us with documentation during the review process"¹³. Since the record clearly shows that the applicant was never provided with the opportunity to demonstrate that it was an eligible entity, the SLD finding must be vacated and the issue of the applicant's

¹² The Applicant acknowledges the need to verify an entity's eligibility, however to do so in a manner that discriminates against and disqualifies eligible applicants is not a reasonable application of the Commission's rules under the schools and libraries support mechanism. *see United Talmudical Order* 15 FCC Rcd 430-431, para. 15.

¹³ SLD website, www.sl.universalservice.org/reference/AppealsSLDGuidelines.asp

eligibility for Universal Service shall be remanded for further review so that Eastern Parkway Chabad Resource Center, Library of Agudas Chassidei Chabad Lubavitch may be given the opportunity to provide documentation as to the nature of its library classification and as to its eligibility under (h)(4) and its qualification according to 20 USC 9122(2)(d).

CONCLUSION-RELIEF REQUESTED

The SLD erred in its interpretation of 254(h)(4) in requiring the applicant to meet state imposed LSTA eligibility criteria. The SLD further erred in its classifying an entity that does not qualify for participation in a state's LSTA funded program, because of that state's discretion not to allocate funding to an eligible entity, as "not eligible for assistance from a State library administrative agency under the Library Services and Technology Act". The SLD also exceeded its authority in interpreting unclear provisions of statutes or rules. In the alternative, the SLD did not give the applicant an opportunity to provide information during the review process.

Because of the above stated reasons Eastern Parkway Chabad Resource Center, Library of Agudas Chassidei Chabad Lubavitch requests that the Commission grant the following relief;

- 1.) Find that Eastern Parkway Chabad Resource Center, Library of Agudas Chassidei Chabad Lubavitch was eligible to receive funding for Year 4, and that such funding shall be granted¹⁴.
- 2.) Find that Eastern Parkway Chabad Resource Center, Library of Agudas Chassidei Chabad Lubavitch is an entity eligible to receive funding in Year 5 and in future years.
- 3.) Find that the SLD was not authorized to determine an entity's eligibility

¹⁴ pursuant to 47 USC 254(h)(4) and 20USC 9122(2)(d)

based on the interpretation of an unclear statute¹⁵.

- 5.) In the event that it shall be determined that further information is required in order to determine the nature of Eastern Parkway Chabad Resource Center, Library of Agudas Chassidei Chabad Lubavitch's status under 20 USC 9122(2)(d) that the applicant shall be afforded the opportunity to provide such information, and that the SLD should advise the applicant as to how such information may be provided¹⁴.

¹⁵ pursuant to 47CFR 54.702(c)

¹⁴ pursuant to Request for Review by St. Stanislaus Grade School, Order No. DA 01-285, File No. SLD-142493, and SLD stated policy as posted on the SLD website